# Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(W)-1650–10 OF 2015
HAMID SULTAN, UMI KALTHUM AND ASMABI MOHAMAD JJCA
29 JUNE 2016

*Civil Procedure — Pleadings — Departure from — Respondent sought to adduced new evidence — Trial court allowed application — Trial court held evidence sought to be adduced did not constitute radical departure from pleadings — Appellant appealed — Whether evidence sought to be adduced radical departure from pleadings — Whether there was agreement established between appellant and respondent as per pleaded case*

This was an appeal against the decision of the trial court in allowing the respondent's claim notwithstanding the respondent's claim and evidence were in breach of the pleading rules as well as the issues to be tried. At the trial stage, the learned trial judge held that there was in fact an agreement when there was no such agreement in law as per pleaded case. The agreement in the pleadings related to an agency agreement ('February agreement') by Pacific Fantasy Vacation, a business registered under the Registration of Business Act 1956 whereas the respondent is Pacific Fantasy Vacation Sdn Bhd, a company incorporated under the Companies Act 1965. The issue for determination was whether there was an agreement established between the appellant and the respondent as per pleaded case.

**Held**, allowing the appeal with costs of RM40,000 here and below, subject to allocatur:

(1) Whether there was an agreement between the respondent and the appellant based on the February agreement was a question of law. No amount of evidence, version or story, etc will change the issue related to law (see para 14(a)).

(2) The court was of the view that the respondent's version was a radical departure from the pleadings and the agreed issues, and was not just a variation, modification or development of what had been alleged in pleading in question or stated in the issues to be tried relating to law (see para 14(b)).

(3) Based on the facts of the case as a whole and the fact that the agreement was not signed between the respondent and the appellant and there was no alternative claim for quantum meruit, and the fact that some third

party had been paid by the appellant for the services rendered to the appellant, the court was of the view that it was not a proper exercise of discretion to waive the 'gold standard' related to pleadings rules, to the prejudice of the appellant when the appellant's position was that, there was no valid and enforceable agreement between the respondent and the appellant in law (see para 14(c)).

**[Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan mahkamah perbicaraan dalam membenarkan tuntutan responden meskipun tuntutan dan keterangan responden adalah memungkiri peraturan-peraturan pliding dan juga isu untuk dibicarakan. Pada peringkat perbicaraan, hakim perbicaraan yang bijaksana memutuskan bahawa sebenarnya terdapat perjanjian apabila tidak terdapat perjanjian sedemikian dari segi undang-undang seperti kes yang diplidkan. Perjanjian dalam pliding yang berkaitan kepada perjanjian agensi ('perjanjian Februari') oleh Pacific Fantasy Vacation, perniagaan yang didaftarkan di bawah Akta Pendaftaran Perniagaan 1956 sementara responden adalah Pacific Fantasy Vacation Sdn Bhd, syarikat yang diperbadankan di bawah Akta Syarikat 1965. Isu bagi penentuan adalah sama ada terdapat perjanjian dibuktikan di antara perayu dan responden seperti kes yang diplidkan.

**Diputuskan**, membenarkan rayuan dengan kos sebanyak RM40,000 di sini dan Mahkamah Tinggi, tertakluk kepada alokatur:

(1) Sama ada terdapat perjanjian di antara responden dan perayu berdasarkan perjanjian Februari adalah soalan undang-undang. Tiada ada keterangan, versi atau cerita, dan lain-lain akan menukar isu berkaitan kepada undang-undang (lihat perenggan 14(a)).

(2) Mahkamah berpendapat bahawa versi responden adalah penyimpangan radikal daripada pliding dan isu-isu yang dipersetujui, dan bukan semata-mata kelainan, modifikasi atau perkembangan mengenai apa yang didakwa di dalam pliding yang dipersoalkan atau dinyatakan di dalam isu-isu untuk dibicarakan berkaitan kepada undang-undang (lihat perenggan 14(b)).

(3) Berdasarkan atas fakta kes secara keseluruhan dan fakta bahawa perjanjian tidak ditandatangani di antara responden dan perayu dan tidak terdapat tuntutan alternatif bagi quantum meruit,dan fakta bahawa pihak ketiga telah dibayar oleh perayu bagi perkhidmatan yang diberikan kepada perayu, mahkamah berpendapat ia bukan pelaksanaan betul budi bicara untuk mengetepikan 'gold standard' berkaitan peraturan-peraturan pliding, memprejudiskan perayu apabila kedudukan perayu adalah bahawa, tidak terdapat perjanjian yang sah dan boleh dikuatkuasa di antara responden dan perayu dari segi undang-undang (lihat perenggan 14(c)).]

**Notes**

For cases on departure from pleadings, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7004–7016.

**Cases referred to**

*Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 (refd)
*KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10, FC (refd)
*Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, SC (refd)
*Lim Kim Chuan v Hari Singh* [1981] 1 MLJ 241, FC (refd)
*Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1, PC (refd)
*Pacific Fantasy Vacation Sdn Bhd v Heritage Grand Vacation Club Bhd* [2015] MLJU 860; [2015] 1 LNS 746, HC (refd)
*Recaliva Design Steel (M) Sdn Bhd v Vista Access Sdn Bhd* [2008] 6 MLJ 604; [2008] 10 CLJ 491, HC (refd)
*Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185, SC (refd)
*State Government of Perak v Muniandy* [1986] 1 MLJ 490, SC (refd)
*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, SC (refd)

**Legislation referred to**

Companies Act 1965
Limitation Ordinance
Registration of Businesses Act 1956

**Appeal from:** Civil Suit No S6–22–867 of 2005 (High Court, Kuala Lumpur)

*Gan Techiong (Gan & Lim) for the appellant.*
*V Manokaran (N Yohendra with him) (Netto & Yohendra) for the respondent.*

**Hamid Sultan JCA (delivering judgment of the court):**

**[1]** The appellant/defendant appeals against the decision of learned judicial commissioner who allowed the respondent's/plaintiffs claim notwithstanding the plaintiff's claim and evidence were in breach of the pleading rules as well as the issues to be tried.

**[2]** In the instant case, the plaintiff was not able to establish an agreement between the plaintiff and the defendant as per the pleaded case. The hotly contested issue was that there was no such agreement and it was also an agreed issue to be tried before the court. The learned trial judge in reliance of the case of *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 had written a comprehensive and articulate

judgment to substantiate that there was in fact an agreement when there was none in law as per the pleaded case.

**[3]** The agreement in the pleadings related to an agency agreement by Pacific Fantasy Vacation, a business registered under the Registration of Businesses Act 1956. The plaintiff is Pacific Fantasy Vacation Sdn Bhd, a company incorporated under the Companies Act 1965. Both are two different entities in law. The distinction is not one of an apple and an orange but of marble and pumpkin in relation to the facts of this case and the legal status to sue on the agency agreement.

**[4]** It is well established that it is not the function of the court to build a case for the plaintiff/defendant inconsistent with the pleaded case. In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, the Supreme Court had in strong terms held, and which still stands as a 'gold standard' in pleading rules and evidence, as follows:

> *It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point.* In disposing of a suit or matter *involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings*. The trial of a suit should be confined to the pleas on which the parties are at variance. (Emphasis added.)

**[5]** The above case must be seen to be the 'gold standard' for pleading rules and is consistent with a long line of authorities from England as well as Malaysia (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10). In *Recaliva Design Steel (M) Sdn Bhd v Vista Access Sdn Bhd* [2008] 6 MLJ 604; [2008] 10 CLJ 491, Hamid Sultan JC (as he then was) on pleading rules and issues to be tried made the following observations:

> After having heard the evidence of the defendants, it is crystal clear to me that the version defendants attempted to project to me was never part of their defence. In such circumstances, the court is not obliged to consider in its judgment, stories which are not reflective of the pleadings. Pleadings are essential foundation to analyse disputes. Evidence must relate to pleadings and/or directly relevant to pleadings. The court is not concerned what issues the parties have framed for the determination of the court, when such issues cannot be reflective of the issues to be dealt with pursuant to the pleadings.

**[6]** This 'gold standard' also plays an important part when parties as per the pleadings have agreed to the issues to be tried. That is to say, the issues to be tried must be as per the pleadings or arising from the pleadings and cannot be one which can be said to be the unpleaded case of the parties. The 'gold standard' has a number of exceptions in a restricted sense and those exceptions

are not meant to override the 'gold standard' for pleading rules in all aspects. For example:

(a) in the Privy Council decision of *Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1, a point on acknowledgement of debt which was not pleaded in the statement of claim but introduced in evidence which was admitted, was held by the Privy Council to be part of the total material the judge had to decide the case on. In this case, the respondent relied on the Limitation Ordinance in their defence. The appellant, neither in their statement of claim or reply had pleaded any acknowledgement of the debt. However, the letter of acknowledgement by the respondent was put in and admitted in evidence during the trial. Lord Bridge of Harwich observed:

> So, in the instant case, the only time when objection could have been taken to the admission in evidence of the respondent's letter of January 14, 1974, on the ground that the acknowledgement had not been placed, was when the evidence was tendered. It is true that if the objection had then been taken and application had been made to amend the pleadings, this could have been successfully opposed on the ground that by January 23, 1980 the right of action deemed to have accrued on the date of the letter had itself become statute-barred. But once the letter was received in evidence without objection this consideration became immaterial. The letter became part of the total material on which the judge had to decide the case and since the writ in the action had been issued well within the period of six years from the date of the letter, the bank's claim, if the letter constituted an effective acknowledgement, was not statute-barred;

(b) the Supreme Court in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 accepted the 'gold standard' to the pleading rules but went on to say that evidence when given without any objection by the opposing party, would have the effect of curing the absence of such plea in the relevant pleading, asserting the exception as follows:

> The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to a proposition, which was approved by *Ang Koon Kau & Anor v Lau Piang Ngong, and John G Stein & Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.
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> *Therefore a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.* (Emphasis added.)
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> In the instant appeal, evidence bearing on the two alleged defences is not such

a radical departure but a mere development of what had been alleged by the defendants. Such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs.

Not having been taken by surprise by the evidence in question is not only indicated by the failure to object to such evidence as and when it was adduced. It is in any event, actually indicated also by the following circumstances in this case.

**[7]** What is important to note in both the examples above is related to evidence and not issue of law.

**[8]** In the instant case, it was the pleaded case of the plaintiff's that there was a written agreement between the plaintiff and the defendant on or about February 1999. This issue is a question of law. However, it is an undisputed fact that the plaintiff was only incorporated on 24 December 1999 and the February agreement has no legal nexus to the plaintiff at all. This distinction is vital in relation to the locus issue, that is to say the plaintiff has no locus to sue on the February agreement. *In addition, the plaintiff's case as per the pleading refers to February agreement (which it has no locus) throughout and seeks for relief which in our view is unsustainable in law for the plaintiff to obtain judgment based on an agreement which has no legal nexus to the plaintiff.* (Emphasis added.) We will elaborate on this issue further in our judgment. Any reasonable tribunal having read the amended statement of claim in full will come to the conclusion that the plaintiffs claim is unsustainable in law when the agency agreement was not between the plaintiff and the defendant.

**[9]** The memorandum of appeal, inter alia, reads as follows:

(1) Pesuruhjaya kehakiman Mahkamah Tinggi yang bijaksana terkhilaf kerana gagal memutuskan tuntutan responden/plaintif menurut isu-isu yang dipersetujui untuk perbicaraan ('issues for trial') yang dipersetujui oleh kedua-dua pihak semasa pengurusan kes diadakan di hadapan Yang Arif sendiri, yang mana isu utama adalah sama ada perayu/defendan ada memasuki apa-apa kontrak dengan responden/plaintif dalam *bulan Februari 1999* dan yang mana keterangan diperbicaraan membuktikan responden/plaintif tidak wujud dalam bulan Februari 1999.

(2) Pesuruhjaya kehakiman Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dalam memutuskan bahawa seseorang plaintif tidak terikat oleh isu-isu yang dipersetujui untuk perbicaraan ('not bound by the issues for trial') yang dipersetujui oleh kedua-dua pihak semasa pengurusan kes diadakan di hadapan Yang Arif sendiri.

(3) Pesuruhjaya kehakiman Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dan fakta dalam memutuskan bahawa suatu dokumen yang tidak jelas kandungannya dan yang tidak pernah

ditandatangani oleh perayu/defendan boleh dianggap sebagai suatu perjanjian yang mengikat perayu/defendan dengan responden/plaintif walaupun syarikat responden/plaintif tidak wujud (belum dipertubuhkan) pada masa perjanjian dikatakan telah diwujudkan.

(4) Pesuruhjaya kehakiman Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dalam memutuskan bahawa perayu/defendan perlu membantah keterangan responden/plaintif yang bercanggah dengan pernyataan tuntutan responden/plaintif dari dikemukakan walhal responden/plaintif yang bertanggungjawab mengemukakan keterangan yang selaras dengan pernyataan tuntutan terpindanya.

(5) Pesuruhjaya kehakiman Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dan fakta dalam menetapkan jumlah RM2,209,555 sebagai jumlah yang perlu dibayar oleh perayu/defendan kepada responden/plaintif walaupun tiada keterangan yang sah dikemukakan oleh responden/plaintif tentang angka ini dan tanpa mengambil-kira keterangan saksi dari HGVC Marketing Sdn Bhd.

**[10]** The statement of issues to be tried between the plaintiff and the defendant reads as follows:

(1) Whether the defendant had on or about February 1999 entered into an agreement with the plaintiff and had any contractual relationship with the plaintiff from February 1999?

(2) If the answer to issue (1) above is in the affirmative, whether the defendant unlawfully breached the said contract on 21 September 2001?

(3) If the answer to issue (2) above is in the affirmative, whether due to the breach by the defendant, the plaintiff subsequently suffered loss and damages?

(4) If the answer to issue (2) above is in the affirmative, whether there is a sum of RM2,389,164.42 due and owing by the defendant as commission for service rendered pursuant to the said contract between the plaintiff and the defendant?

(5) If the answer to issue (2) above is in the affirmative, whether damages are payable to the plaintiff for unlawful breach/repudiation of contract by the defendant?

(6) If the answers to issues (4) and (5) above are in the affirmative, whether the plaintiff's claim or part of it ought to be barred by the Limitation Act and/or by the Doctrine of Laches from being claimed by the plaintiff against the defendant?

(7) If the answers to issues (4) and (5) above are in the affirmative, whether any settlement between the defendant with HGVC Marketing Sdn Bhd and/or with Mr Chua Kim Hwa should be deemed to be a settlement which binds the plaintiff?

**[11]** What is important to note here is that the first issue is one related to law and if it is in favour of the defendant, then the plaintiff will have no case. In addition, we wish to say that the law recognises the fact that there may not be a written agreement in law for services rendered to enforce the terms as per the agreement but a claim for *quantum meruit* may be possible if it is the pleaded case of the plaintiff at least in the alternative. This was not the case here. There was no plea for *quantum meruit.* The plaintiff is bound by the admitted facts in its pleading that the plaintiff was incorporated on 24 December 1999, whereas the purported written agreement between the plaintiff and the defendant was on or about February 1999 (see the decision of the Supreme Court in *State Government of Perak v Muniandy* [1986] 1 MLJ 490, and also the decision of the Federal Court in *Lim Kim Chuan v Hari Singh* [1981] 1 MLJ 241).

BRIEF FACTS

**[12]** The facts of the case is well articulated by the learned judicial commissioner and is reported as *Pacific Fantasy Vacation Sdn Bhd v Heritage Grand Vacation Club Bhd* [2015] MLJU 860; [2015] 1 LNS 746. In consequence, to save judicial time, we will not repeat the facts of the case. However, we would like to produce *verbatim* the submission of the plaintiff in relation to the facts and pleadings, which reads as follows:

> 3. The facts of this case will show that the plaintiff/respondent pleaded the agency agreement between the plaintiff and the defendant in the following terms:
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> > In or about February 1999, the plaintiff, through its agent, Ooi Chid Li entered into an agency agreement with the defendant ('the agreement') where essentially the plaintiff is appointed as the defendant's agents to sell the HGVC memberships in return for commission.
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> (See the para 4 of the respondent's statement of claim at p 53 of *Rekod Rayuan Jld* 1/8.)
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> 4. At the trial, PW1, Ooi Chid Li gave evidence that she executed the agency agreement in February 1999 on behalf of Pacific Fantasy Vacation and that she only formed Pacific Fantasy Vacation Sdn Bhd (the plaintiff/respondent) on 24 December 1999.
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> 5. PW1 further testified that the plaintiff/respondent was also in fact owned by her and the plaintiff/respondent adopted and implemented the February 1999 agency agreement and the defendant/appellant accepted the plaintiff/respondent as the agent under the agency agreement and continued to implement the said agency agreement.
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> 6. There was no objection taken by defendant/appellant to the introduction of this evidence.
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> 7. In the light of the above evidence, the learned judge framed the following issues to be adjudicated and decided by the court (see para 10 of the grounds judgment at *Rekod Rayuan Jld* 1/8):

(a) whether the plaintiffs claim must necessarily fail on a point of pleading, on the basis that the purported agreement was stated in the statement of claim to have been entered into prior to the date of incorporation of the plaintiff;

(b) whether O 24 of the Rules of Court 2012 operated to bind the parties to the specific issues delineated in the list of issues for trial agreed between the parties in the pre-trial case management conferences before the court. As the plaintiff had not yet been incorporated on the date specified in the first issue in the list of issues for trial, the defendant argued that this court must find that there was no contractual relationship between the parties at the material time and must accordingly dismiss the plaintiffs claim; and

(c) whether there was any contractual relationship between the plaintiff and the defendant governing the payment of commissions on the sale by the plaintiff of timeshare memberships of the defendant, and in particular whether the defendant was bound to the plaintiff by the terms of the agency agreement;

8. The learned judge relied on the Supreme Court authority of *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 which held that:

> ... when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it would be too late when it is only objected to later on, as in the final submission at the close of evidence in the instant appeal.
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> ... therefore, a court inevitably ought to inquire, when there is a failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.

9. The learned judge correctly held that (at para 19 of the grounds of judgement at p 17 of *Rekod Rayuan Jld* 1/8):

> in the present case, no objection was raised by the defendant when the plaintiff sought to introduce evidence that was at variance with its statement of claim. In my judgement, the evidence that was sought to be adduced did not constitute such a radical departure from the plaintiffs original claim as would justify dismissal of the plaintiffs action. The defect in the plaintiffs pleadings is therefore cured ...

**[13]** What is clear from the submission of the learned counsel of the plaintiff is that the plaintiff did not proceed as per the pleaded case and there was a different version placed before the court during trial without an amendment and that is fatal and ought not to have been condoned by the court, based on the 'gold standard' related to pleading rules as well as issues to be tried, which we had mentioned earlier. The fact that the evidence of different version was not objected to is immaterial in this case as the issue related to the agreement is

a question of law. Even in cases where there is no objection and the court is minded to uphold the evidence, the court should diligently direct the relevant party to amend the pleadings by way of an oral application to maintain fairness in trial process. Pleading rules is one relating to fairness and the court should at all times maintain the fairness process. Even in the case of *Superintendent of Lands and Survey,* the court had emphasised the duty to enquire which we have highlighted earlier. Only in exceptional facts that the 'gold standard' can be compromised to a particular evidence not a version which will be different from the pleaded case.

**[14]** We have read the appeal record and the able submissions of the parties. After giving much consideration to the submission of the learned appellant's/defendant's counsel, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) whether there was an agreement between the plaintiff and the defendant based on the February agreement is a question of law. No amount of evidence, version or story, etc will change the issue related to law;

(b) the plaintiff's version in our considered view, is a radical departure from the pleadings and the agreed issues, and is not just a variation, modification or development of what has been alleged in pleading in question or stated in the issues to be tried relating to law; and

(c) taking the facts of this case in a holistic manner and the fact that the agreement was not signed between the plaintiff and the defendant and there was no alternative claim for *quantum meruit,* and the fact that some third party has been paid by the defendant for the services rendered to the defendant, we do not think that it is a proper exercise of judicial discretion to waive the 'gold standard' related to pleading rules, to the prejudice of the defendant when the defendant's position is that there is no valid and enforceable agreement between the plaintiff and the defendant in law. In consequence, the judgment though was meticulous and reasoned, it did not pass the acid test of reasonableness when contrasted with the 'gold standard' relating to pleading rules its exceptions and its restricted application.

**[15]** For reasons stated above, we allow the appeal with costs of RM40,000 here and below, subject to allocatur. Deposit is to be refunded.

We hereby order so.

*Appeal allowed with costs of RM40,000 here and below, subject to allocatur.*

Reported by Dzulqarnain Ab Fatar